

Civil Division - Wilmington

August 11, 2005

Russell T. Larson  
Controller General  
Office of the Controller General  
Legislative Hall  
Dover, DE 19901

Dear Mr. Larson:

By letter dated July 28, 2005, you have asked for “an opinion on the legality of the Environmental Appeals Board (hereinafter the “EAB”) vote to overturn the mandate contained in Senate Bill No. 190, Section 81.” As will be explained below, because the EAB’s Final Order and Decision appears to acknowledge that it did not actually vote to overturn Section 81, the real question presented is whether Section 81 or the EAB’s final order controls? Because we have concluded that Section 81 was intended to create project-specific exceptions to the permitting requirements of the relevant environmental statutes, it is our opinion that Section 81 controls over the EAB’s order.

In order to explain how the foregoing conclusion was reached, we begin with a brief recitation of the relevant history of the Assawoman Canal dredging project. The project is to be completed on State-owned land but has been tied up in the permitting process or in litigation for approximately 18 years. It has been repeatedly modified during that time period to reduce its

environmental impacts by, for example, changing the dredging methods to be employed and by reducing the proposed depth and width of the dredged channel. The General Assembly has appropriated funds for the project on several occasions during the last 18 years. Permits for the most recent incarnation of the project were issued by the Department of Natural Resources and Environmental Control in Secretary's Order 2004-W-0047 dated August 12, 2004.

This matter is in its present procedural posture because the Sierra Club appealed to the EAB following the issuance of the Secretary's Order. After two full days of hearings on the appeal, the EAB on May 10, 2005 unanimously decided to remand the appeal of the permit to the DNREC Secretary "with instructions to conduct a new cost/benefit analysis in accordance with the Agency's regulations and methodology and not inconsistent with the Board's reasoning to be incorporated in its final order and decision." After the EAB's May 10, 2005 vote but before the EAB's final order, the General Assembly passed Senate Bill 190, the 2006 Capital Improvements Act (hereinafter the "Bond Bill"), on June 30, 2005. Section 81 of that legislation states:

It is the express finding of the General Assembly that the benefits of dredging and maintaining the Assawoman Canal exceed the costs of such project and the Secretary of Natural Resources and Environmental Control is hereby directed to initiate all necessary actions to dredge the Canal pursuant to all terms and conditions provided for in the state and federal permits issued for the project and initially authorized by the Secretary's Order 2004-W-0047 dated August 12, 2004.

Additionally, Section 153 of the Bond Bill provided that “[i]nsofar as the provisions of this Act are inconsistent with the provisions of any general, special, or local laws, or parts thereof, the provisions of this Act shall be controlling.”

The EAB issued its Final Order and Decision on July 26, 2005 and explained therein that following the passage of the Bond Bill, it conducted further deliberations

[t]o consider the potential effects of the General Assembly’s action relative to the appeal. The General Assembly’s pronouncement on this matter may raise issues of import under both the Constitutions of the United States and the State of Delaware. The Board recognizes that the consideration of such issues may be outside its purview. Furthermore, as the interaction between the Board’s statutory authority and the General Assembly’s pronouncement in Section 81 of the Bond Bill is not entirely clear, the Board chooses to continue in its role consistent with its enabling statute and issue its decision and order in this appeal.

Based on the EAB’s statement that “the interaction between the Board’s statutory authority and the General Assembly’s pronouncement in Section 81 of the Bond Bill is not entirely clear,” it appears that the EAB acknowledged that it did not actually “vote to overturn the mandate contained in the Bond Bill.” Rather, perceiving that its final order *possibly* overlapped Section 81, the Board issued its decision in this matter consistent with what it believed to be its statutory authority.

It seems reasonable to assume that the General Assembly was aware of the history and status of the Assawoman Canal project when it enacted Section 81. Indeed, the wording of Section 81 suggests that it was aware of the EAB’s May 10, 2005 vote. Whenever the Legislature enacts a provision, it is presumed to have had in mind the previous statutes relating to the same subject matter, *State v. Hollobaugh*, 297 A.2d 395 (Del. Super. 1972), and

Legislative language is interpreted on the assumption that the Legislature is aware of judicial decisions. *Scribner v. Chonofsky*, 310 A.2d 924 (Del. Ch. 1973). Thus, it does not seem reasonable to assume that the General Assembly, by enacting Section 81, simply intended DNREC to continue the ongoing litigation; otherwise, the General Assembly would have taken no action. “The enactment of legislation presupposes some change in the existing law.” 1A *Norman J. Singer, Sutherland Statutes and Statutory Construction* §23:9 at 461 (6<sup>th</sup> Ed. 2002). Therefore, the language employed by the General Assembly in Section 81 should be read as a declaration that it is satisfied with “all terms and conditions provided for in the state and federal permits issued for the project” and that the project should be completed notwithstanding the legislatively-created permitting and other requirements set out in Title 7.

Additionally, the General Assembly’s statement in Section 153 of the Bond Bill that “[i]nsofar as the provisions of this Act are inconsistent with the provisions of any general, special, or local laws, or parts thereof, the provisions of this Act shall be controlling” tends to demonstrate that the provisions of Section 81 were intended to create specific modifications of the permitting requirements set forth in Chapters 60 and 70 of Title 7 with respect only to the Assawoman Canal dredging project. While the General Assembly could have been more precise and specifically waived the other statutory requirements, the General Assembly is not required to legislate with razor-sharp precision. *See, e.g. Delaware State University v. Delaware State University Chapter of the American Association of University Professors*, 2000 WL 33521111, (Del. Ch. May 16, 2000) (No. Civ. A. 1389-K) (the General Assembly is a citizens’ legislature without a full-time staff whose job it is to assist the members in drafting bills). As long as the

legislative intent is clear from the statutory language (i.e., its intent that the specified permits and conditions are satisfactory and that the project should proceed without further delay) and so long as that legislative goal itself violates no constitutional prohibition, there is no reason to invalidate Section 81. A legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt. *Klein v. National Pressure Cooker Co.*, 64 A.2d 529 (Del. 1949). Moreover, it is to be presumed that the Legislature did not intend an unreasonable, absurd or unworkable result. *E.I. DuPont De Nemours & Co. v. Clark*, 88 A.2d 436 (Del. 1952).

The conclusion that the primacy of Section 81 over the EAB's Final Order and Decision is supported by *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). In that analogous case, the United States Supreme Court upheld Congress' enactment of an appropriations bill which approved the plans of two federal agencies about which at least three lawsuits were then pending. The statute in question declared that:

The Congress hereby determines and directs that management of areas according to [agency plans] on the thirteen national forests... is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the [pending lawsuits]. . . .

*Robertson* has quite similar facts and therefore supports our above-stated conclusion because the Supreme Court approved, in an appropriations bill, a congressional declaration that the plans of two federal agencies met certain statutory requirements and thereby ended controversial litigation over those requirements.

Mr. Russell T. Larson  
Page 6

Thus, it is our opinion that the General Assembly intended Section 81 of the Bond Bill to be an exception to the permitting requirements of 7 *Del. C.* Chapters 60 and 72, and is, therefore, controlling over the Environmental Appeals Board's July 26, 2005 Final Order and Decision.

Very truly yours,

Robert F. Phillips  
Deputy Attorney General

Approved by:

Malcolm S. Cobin  
State Solicitor